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Supreme Court, U.S.
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No. 93-1783

In The

Supreme Court of the United States

October Term, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Should this Court exercise its discretionary jurisdiction to review a decision of the United States Court of Appeals for the Fourth Circuit when there is no true conflict among the circuits and the decision below materially affects few persons other than the Director, Office of Workers' Compensation Programs of the United States Department of Labor?

PARTIES

The petitioner is the Director, Office of Workers' Compensation Programs of the United States Department of Labor ("the Director"). The Respondent is the Newport News Shipbuilding and Dry Dock Company. The Claimant, Jackie Harcum, expressly declined to participate in the Director's appeal of the Benefits Review Board's decision to the United States Court of Appeals for the Fourth Circuit and he is not participating in this appeal.

CORPORATE AFFILIATIONS

The Newport News Shipbuilding and Dry Dock Company is a wholly owned subsidiary of Tenneco, Incorporated.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

ARGUMENT 2

I. THERE IS NO TRUE CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE DIRECTOR HAS STANDING TO SEEK REVIEW OF BOARD DECISIONS WHEN THE CLAIMANT DOES NOT JOIN IN THE APPEAL 2

II. THE FOURTH CIRCUIT'S DECISION HAS LITTLE MATERIAL EFFECT ON ANYONE OTHER THAN THE DIRECTOR, AND THUS, THERE IS NO IMPORTANT REASON TO REVIEW THAT DECISION 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES:

Director, O.W.C.P. v. Donzi Marine, Inc., 586 F.2d 377 (5th Cir. 1978) 3, 5, 7

Director, O.W.C.P. v. National Van Lines, Inc., 613 F.2d 972, 977 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980) 4

Director, O.W.C.P. v. Perini North River Assocs., 459 U.S. 297 (1983) 3

Fusco v. Perini N. River Assocs., 601 F.2d 659 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028, *reinstated on remand*, 622 F.2d 111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981) 3

I.T.O. Corp. v. B.R.B., 563 F.2d 646 (4th Cir. 1977) 6

Shahady v. Atlas Tile & Marble Co., 673 F.3d 479 (D.C. Cir. 1982) 5

Thornton v. Brown & Root, Inc., 707 F.2d 149 (5th Cir. 1983), *cert. denied*, 464 U.S. 1052 (1984) 6

CONSTITUTION, STATUTES AND RULES:

U.S. Const. Art. III 5

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* 1

33 U.S.C. § 921(c) 1, 3

33 U.S.C. § 944 6

Sup. Ct. R. 10.1 6

Fed. R. App. P. 15 6

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

This case arises under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("the Act"). The Respondent, the Newport News Shipbuilding and Dry Dock Company, by its undersigned counsel, respectfully submits this Brief in Opposition to the petition for a writ of certiorari of the United States Department of Labor's Director, Office of Workers' Compensation Programs ("the Director"). There is no conflict among the circuit courts of appeals on the question of the Director's standing to seek review of Benefits

Review Board's decisions when the claimant does not participate in the appeal. Moreover, the Director is seeking review of an issue of very limited importance. There is no important reason for this Court to review the court of appeal's decision, and thus, the Director's petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

The Director's Statement of the case notes that the court of appeals amended the caption of this case to reflect that Jackie Harcum was the Claimant in the proceedings below. The Director's statement is correct. The Director, however, omits the fact that, even though the caption was amended, the October 7, 1992 order of the clerk of the court of appeals also explicitly advised the Director that the Claimant was not a party to the review proceeding before the Fourth Circuit.

ARGUMENT

I. THERE IS NO TRUE CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE DIRECTOR HAS STANDING TO SEEK REVIEW OF BOARD DECISIONS WHEN THE CLAIMANT DOES NOT JOIN IN THE APPEAL

The Director asserts that the courts of appeals have rendered conflicting decisions on the question of the Director's standing to petition the courts for review of decisions of the Department of Labor's Benefits Review Board ("the Board"). In addition to the decisions of the United States

Court of Appeals for the Fourth Circuit, the Second Circuit and the Fifth Circuit have also held that the Director does not have standing as a petitioner under Section 21(c) of the Act, 33 U.S.C. § 921(c), unless her pecuniary or specifically designated administrative interests are adversely affected. *See Fusco v. Perini N. River Assocs.*, 601 F.2d 659 (2d Cir. 1979), *vacated and remanded on other grnds.*, 444 U.S. 1028, *reinstated on remand*, 622 F.2d 111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981); *Director, O.W.C.P. v. Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978).[1]

[1] This Court has not addressed the scope of the Director's standing to petition the courts of appeals for review of Board decisions. It has, however, recognized that, although Section 21(c) gives the Director the statutory authority to petition for review of Board decisions, she must still establish that she has standing. In other words, the Director *must* establish that she is adversely affected or aggrieved. *See Director, O.W.C.P. v. Perini North River Assocs.*, 459 U.S. 297, 302-03 (1983). In *Perini*, the respondent argued that the Director did not have standing to seek review of a Second Circuit decision, because the Director was simply attempting to further her interpretation of the Act. This Court did not reach Perini's argument, because the injured employee also filed a brief and was a party to the appeal, and there was no question that the employee had standing. *Id.* at 303-04. Nevertheless, this Court clearly indicated that in order to have standing, the Director must still be adversely affected or aggrieved:

> Although the Director has statutory authority to seek review in this Court, she *may* not have Art. III standing to argue the merits of Churchill's claim because the Director's presence does not guarantee the existence of a justiciable controversy with respect to the merits of Churchill's coverage under the LHWCA.

Id. at 304 (emphasis in original). Thus, the Director does *not* automatically have standing in each and every Longshore Act case before the courts of appeals.

Conversely, the D.C. Circuit has stated that the Director has standing to petition the courts of appeals for review of Board decisions based solely on her position. *Director, O.W.C.P. v. National Van Lines, Inc.*, 613 F.2d 972, 977 n.6 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980). The Director relies on this facial conflict among the circuits as the basis for her petition for a writ of certiorari.

The Director's argument, however, ignores a critical distinction in the *National Van Lines* decision. In that case, the claimant was also a party to the appeal. 613 F.2d at 976-77. The Claimant herein did not seek review of the Board's decision. In fact, in an October 1, 1992 letter[2] to the Clerk of the court of appeals for the Fourth Circuit, Claimant's counsel, on behalf of the Claimant, expressly declined to participate in any review proceeding:

> On behalf of my client Jackie Harcum I wish to state that we have not appealed the decision of the Benefits Review Board. The Director appealed the case and may pursue the case as the director chooses. Claimant has not appealed.

Attachment B to Respondent's Answer to Petitioner's Petition for Rehearing. The Claimant did not seek review of the Board's decision, and he clearly wanted no part of the Director's appeal to the court of appeals.

The only other case the Respondent is aware of addressing the Director's standing to seek review of a Board decision in which the claimant was not a petitioner

[2] The date appearing on Claimant's counsel letter is October 1, 1991. This is, however, a typographical error.

is *Donzi Marine*, 586 F.2d at 378-79.[3] In that case, the court of appeals held that the Director did not have standing as a petitioner. Thus, both courts of appeals that have considered the Director's standing to seek review of Board decisions, which do not adversely impact upon the Special Fund or any of the Director's enumerated responsibilities, *absent the Claimant's participation*, have held that standing does not exist. In such cases, there is no conflict among the circuits.[4] While there is broad language on this issue in other cases cited by the Director, *see Shahady v. Atlas Title & Marble Co.*, 673 F.3d 479, 480 (D.C. Cir. 1982), it is mere dicta because the claimant was at least a participant in those cases.

This Court should wait to address the standing issue until there is a clear conflict in the circuits. If courts of appeals directly address the statutory and Article III standing issues, and reach contrary holdings, then it may be appropriate for this Court to reflect on their reasoning and decide if the matter is worthy of consideration.

[3] The claimant in *Donzi Marine* was awarded benefits, but the Board vacated the compensation award because it determined that the claimant was not engaged in maritime employment. The Director sought review before the court of appeals, but the claimant did not join or participate in the Director's appeal. *Donzi Marine*, 586 F.2d at 378-79. In that case, the Fifth Circuit also held that the Director did not have standing.

[4] In its May 24, 1994 letter to this Court waiving its right to file an opposition to the Director's petition for a writ of certiorari, the Respondent did not disagree with the Director's assertion that there is a conflict among the circuits on this case. Upon further reflection, however, it is apparent that no true conflict exists.

II. THE FOURTH CIRCUIT'S DECISION HAS LITTLE MATERIAL EFFECT ON ANYONE OTHER THAN THE DIRECTOR, AND THUS, THERE IS NO IMPORTANT REASON TO REVIEW THAT DECISION

This Court's Rules provide that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefore." Sup. Ct. R. 10.1. The Rule further provides that one of the reasons which this Court will consider when determining whether to exercise its discretionary power is whether the United States courts of appeals have rendered conflicting decisions on an issue. Sup. Ct. R. 10.1(a). The Director's petition attempts to rely on such a conflict. Such a conflict, as pointed out above, does not exist. Nevertheless, even if such a conflict were to exist, it would not, by itself, be sufficient. The issue must be important.

The issue the Director is asking this Court to review is, however, extremely limited in practical applicability. The Fourth Circuit's decision below noted that the Director, as administrator of the Special Fund created by 33 U.S.C. § 944, clearly has standing to seek review of Board decisions adversely impacting upon the fund. She may also seek review of Board decisions adversely affecting her various specifically designated statutory responsibilities. (Appendix A to Director's Petition for a Writ of Certiorari, 10a-11a). Moreover, in any case not meeting either of these criteria, the Director may move to intervene for good cause pursuant to Rule 15 of the Federal Rules of Appellate Procedure. *See I.T.O. Corp. v. B.R.B.*, 563 F.2d 646, 648 (4th Cir. 1977); *Thornton v. Brown & Root, Inc.*, 707 F.2d 149, 154 (5th Cir. 1983), *cert. denied*, 464 U.S. 1052 (1984). The majority of appellate cases arising under the Longshore Act fall into one, or more, of these three categories.

Cases where the Director alone seeks review of a Board decision concerning the amount of compensation to which a particular claimant may be entitled are anomalous.

The fact that only two cases, *Donzi Marine* and the decision below, have been reported where the Director sought to prosecute such an appeal without the claimant's participation, establishes that the issue the Director wishes reviewed is of no general importance and is extremely limited in its applicability. The question is neither special nor important, and the Director's petition for certiorari should be denied.

CONCLUSION

Petitioner's Petition for Certiorari should be denied.

Respectfully submitted,

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